Sauk Centre, City of

TIME REQUIRED TO RENDER AWARD: 19 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

closed

MINNESOTA TEAMSTERS PUBLIC AND LAW ENFORCEMENT EMPLOYEES UNION, LOCAL 320,	)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 07-PA-0106
Union,	)	
and	)	
THE CITY OF SAUK CENTRE, Employer.	)	DECISION AND AWARD OF ARBITRATOR

APPEARANCES

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On January 4 and 5, 2007, in Sauk Centre, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by

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discharging the grievant, Darren L. Danielson. Post-hearing briefs were received by the Arbitrator on January 29, 2007.

FACTS

The City of Sauk Centre (the "City" or the "Employer") is located in central Minnesota. The Union is the collective bargaining representative of those who work in the City's Police Department (the "Department") in the classifications, Police Secretary, Patrol Officer and Sergeant. The grievant was hired by the Employer in August of 2001, and thereafter he worked as a Patrol Officer until he was discharged on June 28, 2006, at the conclusion of a five-day unpaid suspension.

In February of 2006, when the events occurred that led to the grievant's discharge, the Department employed four full-time Patrol Officers, Gary Nelson, Daniel R. Moldenhauer, Bryon P. Friedrichs and the grievant. The Department also employed one Sergeant, Michael D. Denny, and its Chief of Police, Amor P. Himsl. In addition, the Department sometimes used the services of a part-time Patrol Officer, Daniel Nelson. Himsl and Denny had general supervisory authority within the Department. By Department rule, in the absence of either the Chief of Police or the Sergeant, a full-time Patrol Officer is to direct a part-time Patrol Officers when both are on duty.

On June 22, 2006, Vickie Willer, City Administrator, sent the grievant the following notice of his discharge:

> This is to inform you that based on [the] decision of the City Council of the City of Sauk Centre on June 21, 2006, your employment is being terminated based on the findings and on the investigation report submitted to the City.

You were provided with a complete copy of the investigation report and findings submitted by Richard Setter before the meeting of the Council on June 21. Your representatives had an opportunity to address the Council at the meeting on June 21. In particular, this action is based on:

Conduct unbecoming an officer
Insubordination
Misappropriation of evidence and City property
Violation of city policies and directives
Dereliction of duty
Untruthfulness in statements to superior officers and in Garrity statement

Under the labor agreement, a termination is preceded by a a five-day unpaid suspension. Your suspension period will begin on June 23, 2006, and the termination will be effective on June 28, 2006.

The following summary of the evidence is made from the testimony of witnesses and from documentary evidence presented at the hearing, including a lengthy investigation report prepared by Richard W. Setter, an investigator who was retained by the Employer in February of 2006. Setter's investigation report includes statements taken from the grievant and from other personnel of the Department. The grievant gave two statements to Setter, one on February 23, 2006, and one on April 10, 2006. Both were given after the grievant received a Garrity notice and a directive that he be interviewed by Setter.

On January 19, 2006, the grievant attended a training meeting for law enforcement officers in Melrose, a city near Sauk Centre. In early December of 2005, Himsl had instructed part-time Patrol Officer Daniel Nelson* not to attend further

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* Hereafter, for ease of reference, I usually refer to part-time Officer Daniel Nelson simply as "Nelson," but, when it is necessary to refer to full-time Officer Gary Nelson, I use his first and last name.

trainings without approval from Himsl. Nelson did attend the training of January 19 -- because his Department mail included an "All Officers" training directive providing information about the training and encouraging all to attend. Nelson had not worked for three or four months before the meeting of January 19; he had received the contents of his mail box from the grievant before the training. In the statement given to Setter on March 7, 2006, Himsl said that he distributed the notice of the January 19 training to the mailboxes of all officers, except Nelson, intentionally omitting notification to him. Nelson's mail also included a court notice informing him of the date scheduled for the trial of a case in which he had been the arresting officer (the "Mayers" case).

The grievant and Nelson attended the training of January 19, as did other Patrol Officers and Sergeant Denny. After the training, Nelson asked the grievant if he could "ride along" in the squad car with the grievant that night when the grievant would be on patrol. Nelson was not scheduled to be on duty that night, but the grievant allowed him to ride along, though the grievant had no authority to assign work. Several months earlier, Himsl had informed the Department's personnel that the only people who would be permitted to ride along in the future were the City's Administrative Assistant and the Department's Chaplain, Ronald Hemsworth.

Nelson went home after the training on January 19 and changed into his uniform. At about 7:00 p.m., he arrived at the Department's offices (the "Station") in full uniform, wearing

his utility belt and equipment. The grievant, surprised to see Nelson in uniform, asked him why he was dressed for duty if he was only there to do a ride-along. Nelson said that he wanted to be fully prepared for the possibility of a major arrest. About 8:00 p.m. that night, Himsl came into the Station while the grievant and Nelson were still there. When Himsl asked the grievant why Nelson was at the Station, the grievant said that Nelson was there to prepare for a forthcoming court appearance by copying a video tape made by his squad car camera at the time of arrest. The grievant gave Himsl a ride home and returned to the Station.

In the statement given by the grievant to Setter on February 23, 2006, the grievant told Setter 1) that during the trip to Himsl's home, he told Himsl that Nelson was going to ride along with him that night, 2) that Himsl had given permission to have Nelson ride along and 3) that he returned to the Station and told Nelson that Himsl had approved the ride-along. In his testimony, Himsl denied that he had approved Nelson's ride-along during the trip to Himsl's home, but he conceded that the grievant said he was going to "show [Nelson] the ropes," that he indicated his assent and that the grievant might have interpreted that assent as permission to have Nelson ride along. The grievant did not testify about this subject.

Sometime after the grievant returned from his trip to Himsl's home, he responded to a call in a squad car with Nelson riding along. Later, apparently after returning to the Station, Nelson contacted full-time Officer Gary Nelson who was also on duty that night, using a text message from the Station to Gary

Nelson's squad car. Gary Nelson was accompanied by Chaplain Hemsworth, who was riding along. The text message asked Gary Nelson about the location of several squad car camera tapes other than the Mayers tape. Squad car camera tapes are kept in the Department's Property Room, which is used to store not only squad car camera tapes but other evidence taken during arrests and investigations.

The Property Room was also used to store some non-evidentiary materials, such as targets and paraphernalia used for weapons training. Several witnesses testified that the Property Room was in disorder on January 19, 2006, and that it was habitually in disorder before that date. All the Department's sworn personnel had free access to it, as did the City Administrator and the janitor who cleaned the Station.

Because Daniel Nelson continued to inquire of Gary Nelson about the location of squad car camera tapes, Gary Nelson suspected that Daniel Nelson and the grievant were trying to assemble a collection of interesting arrests shown on the tapes for entertainment purposes -- a "best-of-best" tape, as the parties have referred to it. Gary Nelson returned to the Station, where he found that the tapes in the Property Room had been rummaged through. Eventually, when Gary Nelson informed Himsl about his suspicion that the grievant and Daniel Nelson had copied tapes and were assembling a best-of-best tape, the Employer retained Setter to investigate.

During the investigation, an inventory was taken of the contents of the Property Room. It was discovered that several

firearms that were once being held as evidence -- including a 25.06 rifle (the "rifle") and a Browning .25 caliber semi-automatic pistol (the "Browning handgun") -- were missing from the Property Room. Sergeant Denny told Himsl that he had had a conversation with the grievant sometime in 2004 in which the grievant told Denny that he had the rifle in his possession.

In his testimony, Denny gave the following description of that conversation. Sometime in 2004, the grievant mentioned to him that he had a rifle from the Property Room. He told Denny that it "shot pretty well" and that he intended to try it for deer hunting. Denny testified that he told the grievant to return it to the Property Room immediately, that the grievant did not explain why he had the rifle and that they had no further conversation about it.

In his statement given to Setter during Setter's investigation, Denny said that he and the grievant had only one conversation about the rifle, which he described as follows:

> . . . we were sitting in the squad room one night, and he [the grievant] made mention that that 25.06 shot fairly well. And I said, "How would you know if it shoots well?" And he said, "Well, 'cause I took it home. I'm gonna use it for deer hunting." And I told him right then and there, "That gun needs to come back to the Evidence Room."

On February 10, 2006, after Denny told Himsl that he thought the grievant had the rifle, Denny and Himsl went to the grievant's home and asked for the rifle. The grievant gave it to them, saying that he had intended to clean it and repair it. Denny testified that Himsl asked the grievant if he had anything more from the Property Room and that the grievant answered

"no." Denny testified that the rifle had not been cleaned and repaired to his knowledge.

I summarize the grievant's testimony about the rifle as follows. He could not remember when he took the rifle from the Property Room, but he took it intending to clean it after Himsl told him that confiscated evidence could be sold by the City when the case in which it was taken as evidence was closed -- if the defendant in the case was the owner and was not entitled to its return. Though it was the grievant's purpose to clean the rifle and return it, he did not maintain that Himsl gave him permission to take it and clean it. Later, when he was preparing to clean the rifle, he noticed that its scope was missing the pin that was used to adjust the scope, and he decided to repair the scope. The grievant testified that he had the rifle in his possession at his home for "a couple of years." He fired it once and then used it once for deer hunting. With respect to the conversation about the rifle that he had with Denny, the grievant testified that he thought Denny meant he should return it to the Property Room, eventually when he was done with it.

The grievant told Setter during the investigation that he had had several conversations with Denny about the rifle since the first one, the last of which was in the fall of 2005, that Denny kept reminding him to return the rifle and that he kept forgetting to do so.

Friedrichs did not testify, but he gave a statement to Setter during Setter's investigation. The following is my

summary of what Friedrichs said in that statement about the rifle. He and the grievant confiscated the rifle for evidence after a traffic arrest they made. Later -- Friedrichs was not sure when -- the grievant, Friedrichs and Denny were talking about the driver arrested in that case, and the grievant said, "Oh yeah. I got that rifle." In his statement, Friedrichs reported that Denny told the grievant to get the rifle back to the Property Room and that "it sounded like an order to me. He told him to get the gun back right away."

Himsl testified as follows. He and Denny went to the grievant's home on February 10, 2006, to retrieve the rifle. When he asked for it, the grievant got it from the basement of the house and gave it to Himsl. The grievant may have said that he was going to fix the scope. Himsl asked the grievant if there was "any other property of the Department" that he had, and the grievant responded, "no."

On February 11, 2006, Denny reported to Himsl that a State Trooper, Timothy Salto, had told him that he had once obtained from the grievant a Browning .25 caliber semi-automatic handgun that Salto wanted to use in a weapons training class and that, after using it in the class, he had returned it to the grievant at his home. When Himsl learned this from Denny, he spoke to the grievant by telephone and said he was coming to the grievant's home to get the handgun. The grievant said that he did not want Himsl to do so and that he would bring it to the Station.

Himsl started driving to the grievant's home, and at about the same time, the grievant started driving to the Station

with the Browning handgun. While driving, the grievant saw Himsl's car parked at a gas Station, and he stopped. They had a heated conversation in which the grievant told Himsl that Himsl had given him permission to take the handgun. Himsl denied that he had. The grievant gave Himsl the handgun.

With respect to the Browning handgun, the grievant testified as follows. He had confiscated it in 2002 or 2003 at the time of a traffic stop, in which Salto had been an assisting officer. The driver was charged with carrying a concealed weapon. The case was closed in about 2003, and shortly thereafter, the grievant asked Himsl what would become of the handgun. Himsl said that it might be sold. Later, the grievant asked Himsl if he could keep it, and according to the grievant, Himsl said he did not "have a problem with that."

The grievant testified that after that conversation with Himsl, he kept the Browning handgun in a drawer in his desk at the Station, where it remained for "a couple of years." Sometime in 2005, Salto, while in the grievant's office at the Station, asked the grievant if he could use the Browning handgun in a training class he was going to give, and the grievant gave it to Salto. About a month or two later, Salto brought the handgun to the grievant's home and gave it to him. The grievant put it on a shelf.

The grievant testified that, on February 10, 2006, when Himsl and Denny came to his home, Himsl asked if he had any other evidence, and that he responded "no" to the question because he did not consider the Browning handgun to be evidence

any longer and because he had Himsl's permission to take it. The grievant testified that, on February 11, 2006, when he told Himsl at the gas station that Himsl had given him permission to take the pistol, Himsl said that he did not remember that.

On cross-examination, the grievant testified that he and Himsl had talked about his carrying the Browning handgun while he was off duty. He conceded that Salto later told him that he brought it back to the grievant because he was uncomfortable having it without documentation of its transfer. The grievant testified that he did not ask Himsl for documentation authorizing transfer of the handgun to his possession and that, at the time, he was not aware of the laws relating to the documentation of transfers of confiscated weapons, though he had now learned of them.

Himsl testified as follows with respect to the Browning handgun. When he was on his way to the grievant's home on February 11, 2006, to retrieve it, the grievant drove up while Himsl was stopped at a gas Station. The grievant said, "you should know that you told me I could take the [Browning handgun]." Himsl testified that he did not give the grievant authority to take the handgun, "not that I know of." On cross-examination, Himsl testified that he could not remember telling the grievant he could take it, that it was not possible that he told the grievant he could have the handgun, but it might be possible that he told the grievant he could take it out on Department business.

The following is a summary of what Himsl told Setter about the Browning handgun during the investigative interview of March 7, 2006. When he called the grievant on February 11, 2006, and asked if he had the Browning handgun, the grievant said, "yes, I have it. I forgot it was here." When Himsl asked who gave the grievant permission to have the handgun, the grievant responded, "you did," and Himsl said "I didn't give you permission to have that handgun." Himsl denied having given the grievant permission to take the Browning handgun several times during the interview.

Setter also asked Himsl whether he had given Daniel Nelson permission to take another handgun from the Property Room -- a High Point 9 millimeter handgun (the "High Point handgun"). When Setter interviewed Daniel Nelson on February 23, 2006, Nelson told Setter that he had the High Point handgun in his possession and that Himsl had given him permission to take it. Nelson did not testify, but in his statement to Setter, he said that the High Point handgun was confiscated during an arrest he had made "a couple of years ago," and that, after the charge was disposed of by trial, Himsl gave him permission to take the High Point handgun. When Setter asked how it happened that he had it in his possession, Nelson responded:

> I guess the incident occurred as a traffic stop that was -- the firearm as well as some drug paraphernalia -- meth lab paraphernalia -- was placed in evidence. Shortly after that incident, sometime down the road, the case went to trial and the suspect was a [name omitted] I guess. He was found guilty on the count. The case was closed. After the court trial had concluded, I informed the Chief that there were several items in the Evidence Locker that were hazardous material that needed to be

> disposed of, as the case was closed. And I also made reference to the pistol that we had seized from [the suspect's] vehicle that evening. I guess I asked Chief what he intended to do with it. He said he didn't know. You know, just stay in there, I'd presume. And I asked him if I could have the firearm. He asked me what I wanted it for and what I would do with it. And I informed him that I just wanted it. It's a neat little gun. That I'd use it for off-duty, conceal/carry purposes, as it's definitely smaller than my Glock 40 that I carry for that purpose. I recall him being in his office, leaning back in his chair, looking up at the ceiling and saying, "well, I guess if the case is closed, you can have it."

In his statement to Setter, given on March 7, 2006, Himsl denied having given permission to Nelson or to the grievant or to anyone to take firearms from the Property Room.

In the spring of 2004, the City opened a new building to house City offices. The Department moved its operations to the new building. It closed the Property Room at the old Department offices and moved to the new Station. The exact date does not appear in the evidence. Evidence logs are maintained for property rooms in virtually all police operations. On such a log, an entry is made showing the date the evidence is taken into the property room, with identification of the case, a description of the item and identification of the person making the entry -- usually the arresting officer. Typically, when evidence is taken from a property room, a record is made of its removal, with similar identifying information given.

At the hearing before me, the parties presented in evidence three pages from the Department's evidence log, with the first entry made on April 25, 2004. Entries continue in chronological order thereafter, except that Himsl made several entries relating to firearms during February of 2006, including his entry that the rifle and the Browning handgun were in the

Property Room as of February 10 and 11, 2006. Himsl testified that the evidence log from the old Property Room was started in 1999. The pages from the evidence log that predated April 25, 2004, were missing, and none of the witnesses before me suggested a reason for their absence.

During Himsl's statement to Setter, given on March 7, 2006, Himsl's answers suggested that the grievant caused the old pages from the evidence log to be missing and that it appeared that the grievant had re-written entries on the extant pages -- those that started with the date, April 25, 2004. Himsl testified, however, that he did not blame the grievant for the loss of the missing pages from the evidence log. My examination of the extant pages of the evidence log does not indicate that the grievant has re-written the entries. Nothing in the entries themselves or in other evidence gives support to Himsl's former suspicion that the grievant may have caused the old pages of the evidence log to be missing.

In the statement given by the grievant to Setter on April 10, 2006, he denied that he had destroyed the old pages from the evidence log or that he had rewritten the evidence log. Denny testified that he did not know what became of the old pages from the evidence log.

DECISION

Due Process.

The Union argues that the grievant was denied due process when the Employer refused to provide him and his representatives more time to prepare for a Loudermill hearing that the Employer

held on June 21, 2006. On June 16, 2006, the Employer provided the grievant with a copy of Setter's investigation report, which is 290 pages in length, with notice to him that on June 21, 2006, the City Council would hold a hearing to "give preliminary consideration to charges against" him. The parties agree that the proposed hearing was intended to satisfy the due process requirements established by Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), which decided that fundamental due process requires that a public employee be given notice of a proposed discharge and the opportunity to respond.

On June 21, 2006, the grievant, represented by counsel, appeared at the Loudermill hearing before the City Council. The City Council reviewed the charges against the grievant, as summarized in Setter's investigation report, and the grievant and his representatives were asked if they wanted to respond. They took the position that it was impossible to respond to the charges on short notice and asked for a continuation of the hearing. The Council denied the request, and the grievant's representatives did not present a substantive defense. The Council then met in closed session to consider the charges against the grievant, as supplemented in the closed meeting by Setter. The Council decided to discharge the grievant on grounds substantially the same as those listed in the notice of discharge dated June 22, 2006, which I have set out above.

The Union argues that the June 16, 2006, notice to the grievant of the hearing set for June 21, 2006, failed to meet the requirements of Loudermill that an employee proposed for

discharge has a right to be informed of the charges against him and the opportunity to respond -- because the grievant and his representatives had insufficient time between the notice and the hearing to prepare a response. In addition, the Union argues that the grievant was denied due process 1) because the summary made in Setter's investigation report is so vague that it fails to inform him of the charges against him, and 2) because Setter's supplement to his report made to the Council in the closed part of the meeting on June 21, 2006, left the grievant and his representatives uninformed of the additional information provided by Setter.

The Employer makes the following arguments in response. The grievant and his representatives were informed of the charges against him on several occasions before the notice of June 16, 2006 -- at the time of Setter's interviews of the grievant, with his representative present, on February 23, 2006, and on April 10, 2006. Setter's report is organized so that the charges can be quickly ascertained in his summary, as supported by copies of all interviews. The grievant received Setter's report on June 16, 2006, but did not give it to his representatives till June 21, 2006.

In addition, the Employer argues that case law does not require a delay between the Loudermill notice and the time of the Loudermill hearing, as long as the notice is provided before the hearing, citing Demming v. Housing and Redevelopment Authority of Duluth, 66 F.3d 950 (8th Cir. 1995). The Employer argues that, in any case, the grievant and his representatives

had the opportunity to respond, but chose not to do so. As I understand this argument, it urges that, instead of refusing to make any substantive argument at the Loudermill hearing, his representatives could have made a response to the charges as they read them in Setter's summary and as they understood them from their presence during Setter's interviews of the grievant in February and April.

For the following reasons, I rule that the Loudermill hearing was sufficient to provide pre-discharge due process. The Employer's post-hearing brief includes case law that is determinative with respect to the issues raised by the Union's arguments. In Cross v. Beltrami County, 2001 WL 157038 (Minn.App.), the court stated:

> "An assessment of the adequacy of predeprivation procedures depends on the availability of meaningful postdeprivation procedures." Winegar v. Des Moines Comm. School Dist., 20 F3d 895, 901 8th Cir.1994), . . . The record demonstrates that appellant was given notice and an opportunity to respond to the charges against him, and after his termination he availed himself of a full adversarial evidentiary hearing and was represented at both hearings by private counsel. Therefore, under Loudermill, appellant's due process rights were adequately protected. . . .

In the present case, the grievant had the right to a full evidentiary hearing through the grievance procedure established by the parties' labor agreement, and, in the present proceeding, he has availed himself of that right. The grievant had sufficient information about the charges against him from Setter's report and from the February and April interviews with Setter to fulfill the requirements of Loudermill. If, arguendo, there was a deficiency in the procedure, it was remedied by the

grievant's right to a full post-discharge evidentiary hearing at which he has challenged the discharge.

Substantive Issues.

Section 10.1 of the parties' labor agreement is set out below:

> The Employer will discipline employees for just cause only. Discipline will be in one of the following forms.
>
> A. oral reprimand;
> B. written reprimand;
> C. suspension;
> D. demotion; or
> E. discharge.

The Employer argues that the grievant failed to follow the policies and procedures of the Department 1) by negligently supervising Nelson on the evening of January 19, 2006, when Nelson was viewing and copying squad car camera tapes, 2) by allowing Nelson to ride along with him when he was on patrol that evening, 3) by removing the rifle from the Property Room, 4) by removing the Browning handgun from the Property Room, and 5) by falsely telling Himsl on February 10, 2006, that he had no other property of the City in his possession.

The Union makes the following arguments with respect to the five grounds for discharge alleged by the Employer. First, it argues that, if Daniel Nelson was viewing tapes other than the Mayers tape on January 19, 2006, the grievant's awareness of that conduct was vague at best and no greater than that of senior Patrol Officer Gary Nelson, who knew that Daniel Nelson was asking about the location of tapes, but was not disciplined for failing to stop him. Second, the Union argues that the

grievant had Himsl's permission to allow Nelson to ride along with him on the evening of January 19, 2006 -- that Himsl, with knowledge that Nelson was in full uniform, agreed that the grievant should "show [Nelson] the ropes."

Third, the Union argues that, when the grievant removed the rifle from the Property Room, he had no intention to convert it to his own use. He intended, at first, only to clean it, and later to repair its scope, for the benefit of the Department. Fourth and fifth. The Union argues that the grievant had Himsl's permission to have the Browning handgun and that, therefore, on February 10, 2006, when he responded "no" to Himsl's question whether he had other property of the City, he was telling the truth.

The Union also argues that the grievant's excellent record as a law enforcement officer should ameliorate any discipline. He has had no previous discipline, and his performance evaluations have been without blemish. Himsl testified that the grievant is an excellent officer, that he is a "go-getter" and that he never found the grievant to be untruthful. Himsl did the grievant's performance evaluations from 2001 through 2005 and always rated his performance as "excellent."

Denny testified that the grievant is "a good cop," and that his performance "exceeds standards." Denny testified that Himsl was "incompetent" as Chief of Police, that the Department was chaotic and the Property Room disorganized under his direction. James A. Metcalf testified that, on June 28, 2006. the City Council appointed him Chief of Police, replacing Himsl.

I make the following additional findings of fact and rulings with respect to the allegations of misconduct. First, the evidence supports a finding that, on the evening of January 19, 2006, the grievant was aware that Nelson was viewing tapes in addition to the Mayers tape. The evidence does not support a finding that, in doing so, Nelson intended to make a best-of-best tape of squad car arrests. Accordingly, the evidence does not support a finding that the grievant had knowledge that Nelson had such a purpose. It is clear that Nelson should not have been viewing other tapes for his own entertainment, if that was his purpose, but the grievant's failure to stop him from doing so was a failure condoned by the lack of discipline within the Department and the general disregard throughout the Department for the security of items in the Property Room. This determination is confirmed by the fact that Gary Nelson did not stop Daniel Nelson from viewing the tapes that evening.

Second. The evidence does not support a finding that the grievant disobeyed a Department directive when he permitted Nelson to ride along with him on patrol on the evening of January 19, 2006. As Himsl testified, the grievant could have interpreted Himsl's assent to have the grievant "show the ropes" to Nelson as permission to have Nelson ride along.

Third. It is clear that, under the Department's policies as written, the grievant should not have removed the rifle from the Property Room without permission. He testified that he did not remember having obtained permission from Himsl to remove it, and, without evidence that he had such permission, I find that

there was none. It is also clear, however, that, in taking the rifle, the grievant did not intend to steal it. The testimony of the grievant and Denny, their statements to Setter and the statement given to Setter by Bryon Friedrichs all show that, in the squad room, about two years before the events of February, 2006, the grievant told Denny and Friedrichs openly that he had the rifle in his possession and that he had used it. This open disclosure to Denny, a supervisor, implies an innocent purpose to the grievant's removal of the rifle, albeit based on some error -- either an incomplete knowledge of the Department's procedures or an assumption that, because of the lax administration of the Department under Himsl, strict compliance with Property Room procedures was not required.

The evidence shows that Denny told the grievant to return the rifle to the Property Room during that squad room conversation and that the grievant did not comply. Though he testified that he thought Denny meant that he should do so eventually, on balance, the evidence supports Denny's testimony that his statement was an order to return the rifle without undue delay.

Fourth. The most difficult fact issue presented by this case is whether Himsl gave the grievant permission to take the Browning handgun, as the grievant testified. For that reason, my description, above, of the evidence on this subject is lengthy. The grievant testified without qualification that Himsl gave him permission to take the handgun, and his statement to Setter is consistent with his testimony. From the certainty of his testimony and his account to Setter on this subject, it

appears that he is either telling the truth or that he is lying, though there is perhaps a possibility of a middle stance -- that he misunderstood Himsl to be giving him permission when Himsl intended something less. Himsl's statement to Setter on the subject is definite -- that he did not give the grievant permission to have the Browning handgun and that he would not give anyone permission to take an item from the Property Room. Himsl's testimony was slightly less definite -- 1) that he did not give the grievant authority to take the handgun, "not that I know of," 2) that he could not remember telling the grievant he could take it, 3) that it was not possible that he told the grievant he could have ownership of the handgun, but 4) that it might be possible that he told the grievant he could take it out on Department business.

I have considered the fact that Nelson took the High Point handgun from the Property Room and that he told Setter that he had Himsl's permission to take it. The similarity between the circumstances of his possession of the High Point handgun and the grievant's possession of the Browning handgun can be read two ways -- that together they invented the same false account that Himsl gave them permission, or that Himsl, consistent with his lax administration of the Department and the Property Room, did give them the permission they claimed.

The evidence shows that the grievant had the Browning handgun in his desk drawer for two years and that, in 2005, he took it from the drawer and gave it to Trooper Salto for his use in a training class. This open display of the handgun implies a

lack of guilt about the grievant's possession of the weapon -- though this implication of innocence is weaker than the one that arises from the grievant's open disclosure to his supervisor and to Friedrichs that he had the rifle in his possession.

With respect to this issue of fact, I reach the following conclusions. The evidence is not sufficient to support a finding that the grievant was lying about Himsl's having given him permission to take the Browning handgun. This does not mean either that I think Himsl gave a false account or that the grievant gave a true account. Rather, it means that the evidence is divided -- so divided that it is not sufficient to support a finding that the grievant took the handgun intending to steal it. On this divided evidence, I am unwilling to decide that the grievant took the Browning handgun without Himsl's permission, a decision that, most probably, would end his career in law enforcement.

Fifth. The charge that the grievant was untruthfull on February 10, 2006, when he told Himsl and Denny that he did not have any other property of the City hangs on the same determination. Because the evidence is not sufficient to show that Himsl did not give the grievant permission to keep the handgun, it is also not sufficient to show that he was lying when he said he had no other property of the City.

I reach the following conclusions about the grievant's discharge. He should have stopped Daniel Nelson from viewing squad car tapes other than the Mayers tape on the evening of January 19, 2006, but the record does not show that he was aware

that Daniel Nelson was assembling a best-of-best tape -- if he was. The lax administration of the Property Room, confirmed by Gary Nelson's failure to stop Daniel Nelson from viewing other tapes, a failure for which Gary Nelson was not disciplined, ameliorates the seriousness of the grievant's conduct.

The grievant was not responsible for the fact that Daniel Nelson attended the Melrose training class without obtaining express permission from Himsl. The grievant could have interpreted Himsl's assent to him that he could "show the ropes" to Nelson on the evening of January 19, 2006, as permission to have Nelson ride along -- though I also note that the fact that Nelson showed up in full uniform, wearing his equipment belt, implies that Nelson and the grievant had some communication between them about the ride-along before the grievant's discussion with Himsl.

The grievant took the rifle from the Property Room without first obtaining permission to do so, but his open statement to Denny and Friedrichs that he had the rifle, made long before February of 2006, shows that he had no intent to steal the rifle -- a state of mind that Denny, who did not discipline the grievant, understood. The grievant's failure to follow Denny's directive to return the rifle was misconduct and just cause for discipline.

The evidence does not support a finding that the grievant took the Browning handgun with intention to steal it. He did not comply with statutory requirements relating to the transfer of firearms either because he did not understand those require-

ments at the time or because he thought, with Himsl's permission to take it, he was not obliged to do so.

The award directs the Employer to reinstate the grievant to his position, without loss of seniority and without back pay -- effectively reducing the discharge to a long suspension. The evidence establishes some misconduct, but it fails to prove the gross misconduct of theft. The grievant allowed Nelson to view tapes other than the Mayers tape; he did not return the rifle to the Property Room after being directed to do so by Denny; and he did not follow statutory procedures relating to the transfer of firearms when he took possession of the Browning handgun. The grievant has had no prior discipline, and his performance has always been excellent.

Effectively, the grievant has avoided discharge in this case because of lack of proof. This result disturbs me because I recognize that mere failure of proof does not equal innocence. It would be more disturbing, however, to end the grievant's previously excellent career in law enforcement without proof of gross misconduct.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant to his position without loss of seniority and without back pay.

April 18, 2007

Thomas P. Gallagher, Arbitrator